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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1173

UNITED MARINE DIVISION, LOCAL 333,
NATIONAL MARITIME UNION, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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February 10, 1970

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The petitioner, United Marine Division, Local 333, National Maritime Union, AFL-CIO (herein called the Union) respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 17, 1969.

Opinion Below

The opinion of the Court of Appeals appears in the Appendix hereto and is reported at 417 F. 2d 865.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 17, 1969, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. Whether the Second Circuit is correct in construing the statutory authority of the National Labor Relations Board to issue back pay orders as "intended to be exercised not only to remedy the consequences of an unfair labor practice, but also in aid of the Board's authority to deter unfair labor practices."

2. Whether the National Labor Relations Board can order a union to compensate an employee for back pay lost after his employer refused to reinstate him when the Board has found that his employer was "solely" responsible for its refusal to reinstate him.

Statutory Provisions Involved

United States Code, Title 29:

"§ 158. [61 Stat. 140] UNFAIR LABOR PRACTICES

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing

in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated by reasons other than the failure of the employee to tender the periodic dues and the initation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

§ 160(c) [61 Stat. 147] *Reduction of testimony to writing; findings and orders of Board*

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this

subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be responsible for the discrimination suffered by him:"

Statement of the Case

The judgment of the Court of Appeals ordered the enforcement of an order by the National Labor Relations Board assessing the presently petitioning Union jointly and severally with an employer (herein called the Company) to compensate John Obermeier, an employee of the Company and a member of the Union, for loss of back pay resulting from unfair labor practices allegedly committed by the Company and the Union. The basis of jurisdiction in the Court of Appeals was § 10(e) of the National Labor Relations Act, 61 Stat. 136, as amended 73 Stat. 519. The history and factual background of the case are as follows.

During a debate at a meeting of the Union, Obermeier accused its president, Joseph O'Hare, of "working for" the Company. The president took the position that Obermeier's accusation was defamatory and a violation of the Union's by-laws. In accordance with the Union's constitution, the matter was referred to a "grievance committee" which held a hearing (A245-302).* When questioned by the committee, Obermeier admitted he had no factual basis for his accusation but refused to retract it. The committee determined that Obermeier should be suspended from membership for six months and deprived of privileges for one year. The president of the Union advised the Company of Obermeier's suspension in a letter (A244) putting the Company "on notice to relieve him of his duties immediately." The Company discharged Obermeier immediately.

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* Parenthesized numbers preceded by A refer to pages of Appendix in Court of Appeals, certified and transmitted with record herein.

Obermeier filed charges with the National Labor Relations Board against the Company (A230, A232) and against the Union (A231, A233). The Board consolidated the charges in a single complaint and notice of hearing (A234-239).

As against the Company, the Board's complaint and notice of hearing cited Section 8(a)(3) and (1) of the National Labor Relations Act, 61 Stat. 141, 29 U.S.C. 158(a)(2) and (1). The substance of the Board's complaint against the Company was that it had committed an unfair labor practice by discharging and refusing to reinstate Obermeier because of his suspension from the Union on grounds other than failure to pay dues or initiation fees.

As against the Union, the Board's complaint and notice or hearing cited Section 8(b)(2) and (1)(a) of the National Labor Relations Act, 61 Stat. 144, 29 U.S.C. 158(b)(2) and (1)(A). The substance of the Board's complaint against the Union was that it had committed an unfair labor practice by causing the Company to discharge and refuse to reinstate Obermeier.

The Company's answer (A239-241) to the Board's complaint contained the following averments:

> "2. [The Company] Admits that [the Company] has failed to reinstate said employee, but avers that [the Company] has through a representative of the General Counsel of the Board offered to reinstate Obermeier on condition that he withdraws the false charges that he has made publicly against the Company, which is more fully set forth in the Second Affirmative Defense. (A240)
>
> "3. [The Company] avers . . . that although Obermeier's employment was terminated because of the demand of the Respondent Union . . . the fail-

ure to reinstate him was based upon facts coming to the knowledge of [the Company] shortly after such termination of employment, which facts are detailed in the Second Affirmative Defense. (A240)

* * *

"As and for a Second Affirmative Defense, [the Company] Alleges:

"6. Shortly after the employment of . . . Obermeier, was terminated by [the Company, it] was given a copy of a transcript at a hearing before representatives of the Union, said transcript having been taken by a qualified reporter and a reading of said transcript revealed the following facts:

"Obermeier charged that [the Company] had been allowed by the Union to eliminate certain jobs by reason of an assertedly corrupt agreement between Captain Joseph O'Hare, an executive of the Union, and a representative or representatives of the . . . Company. The acts imputed to the [Company] by Obermeier, if true, would constitute a serious Federal crime. Obermeier, in response to questions of the aforesaid hearing before the Union representatives admitted that he had no evidence to support such accusations. Such accusations by Obermeier are and were false in all respects.

By reason of the making of said unfounded defamatory charges of criminal conduct by Obermeier and his refusal to disavow such charges so that publicity of such disavowal could be given to the many people before whom the charges were made, [the Company] is unwilling to reinstate Obermeier solely for that reason. . . ." (A240-241)

In short, the Company asked the Board to differentiate between the reason for Obermeier's discharge and the rea-

son for the Company's refusal to reinstate him. The Company admitted it had initially discharged Obermeier because of a demand by the Union. But the Company denied that its subsequent refusal to reinstate Obermeier had in any way been caused by the Union. The Company averred it had been "unwilling to reinstate Obermeier solely" because of "his refusal to disavow" accusations of criminal corruption against the Company—accusations which the Company averred it had not even known about until after Obermeier's discharge.

Before the Board held its hearing on the complaint, its counsel, "in order to obtain a settlement and withdrawal as is normal in our practice" (A75-76) held an informal conference with counsel for the Company (A75) and counsel for Obermeier (A55). The Company's counsel conceded that the Company had committed an unfair labor practice in discharging Obermeier on the basis of an improper demand by the Union and that Obermeier was entitled to reinstatement as far as the initial discharge was concerned. However, counsel for the Company took the position that Obermeier's accusations against the Company—accusations only disclosed subsequent to the original discharge—had rendered Obermeier unfit for re-employment and that "we [the Company] don't have to go through with the formalities of a technical reinstatement for two minutes and then discharge him if he persists in his obstructive attitude." (A75). Obermeier's counsel rejected this "conditional offer of reinstatement" (A55) and the case proceeded to a formal hearing before a Trial Examiner.

The issues covered in the hearing were narrowed by concessions of counsel. The Board's counsel conceded that:

> "Of course they [the Union] have a right to suspend Mr. Obermeier from the Union. I am not

> familiar completely with the Union's internal procedures but I have no doubt they followed whatever they are supposed to." (A72)

Counsel for the Company and counsel for the Union both conceded, as the Trial Examiner subsequently reported:

> "that the Union's request to the Company to discharge Obermeier and thus the Company's discharge were based upon factors other than Obermeier's failure to tender dues or inititation fees, and both conceded that such is a technical violation of the Act." (A8)

At the outset of the hearing, the Board's counsel moved "to strike on the grounds of relevancy, the second affirmative defense in the answer of the respondant Company." (A36). In support of the motion, the Board's counsel argued that:

> "even if true, this [second affirmative defense] does not constitute valid ground for the failing to grant unconditional reinstatement of Obermeier, and in this connection I call your attention to the following cases: [citations].
>
> "These cases established the rule that only when the activity engaged in is of such flagrant, violent, serious or extreme misconduct as to render the employee unfit for further service will reinstatement be denied." (A37)

Counsel for the Company, in urging the Trial Examiner not to strike the Company's second affirmative defense, summarized the position of the Company to the effect that:

". . . the important thing is, here is [the owner of the Company], a man of unimpeachable integrity, a man who is a leader in this community, a lifetime of decency, he's been honored by his church, one of the leading laymen of America. . . ." (A48)

". . . so that we may clearly see the issue, the issues are those framed by the pleadings, of course. The complaint of the Board reads:

"'The respondent Company discharged and thereafter failed and refused to reinstate its employee Obermeier because of the demand of the respondent Union as described,' and so forth.

"We join issue on that allegation insofar as it concerns the failure and refusal of reinstatement.

"We say that we failed and refused to reinstate this man because, not on the basis of what he said at the meeting, but on the bases of what he later said at a hearing before a union trial board." (A60-61)

* * *

"This is why I said that we don't have to go through the formalities of a technical reinstatement for two minutes and then discharge him if he persists in his obstructive attitude, and counsel informed me the Board agreed.

"Trial Examiner: May I ask if that is correct, that statement of [Counsel for the Company]?

* * *

"[Counsel for the Board]: . . . [Counsel for the Company] asked me my opinion as to whether it would make any difference legally—I believe, this is all from memory, whether it would make any difference legally if they reinstated him and then a minute later discharged him again.

"I said legally, as far as my knowledge goes, it wouldn't make any difference.

"Trial Examiner: Wouldn't it make a difference as far as [the Union's] position is concerned?

"[Counsel for the Board] In what regard, Mr. Examiner?

"Trial Examiner: Again let the record show that we are talking hypothetically, if that course were taken, instead of the one that apparently has been taken, and Mr. Obermeier were reinstated, and then five minutes later, assertedly for this reason now used as a basis of their second affirmative defense, he were discharged, where does the 8(b)(1)(a) and (2) [complaint against the Union] come in?

"[Counsel for the Board]: At the time I spoke to [Counsel for the Company], [Counsel for the Union] was out of town. I never got in touch with him at the time.

"My answer to [Counsel for the Company] was in regard to the Company's position rather than the Union's 8(b)(2) and 8(b)(1)(a)." (A75-76)

The Trial Examiner granted the motion to strike the Company's second affirmative defense and excluded all evidence concerning the cause of the Company's failure to reinstate Obermeier as distinct from the cause of the initital discharge. The rationale for this ruling was stated as follows in the Trial Examiner's decision:

". . . the Respondent Company, in its second affirmative defense, set forth in its answer and argued at length by counsel at the start of the hearing, took the position that, notwithstanding his improper discharge, because of the nature of Obermeier's conduct and his continued refusal to disavow his remarks

publicly, it would not effectuate the purposes of the Act to order Obermeier's reinstatement. After extensive argument by counsel for all parties, and in part because I was of the opinion that even assuming the truth of the facts asserted by the Respondent Company there existed no valid basis for denying the discriminatee's reinstatement. I granted the General Counsel's motion to strike the Respondent Company's second affirmative defense and denied the latter's offer of proof pertaining thereto.

"In view of my ruling in this regard, only the Respondent Company's first affirmative defense, on which the Respondent Union also relied, remained to be litigated, to wit, that Obermeier a first assistant engineer, is a supervisor within the meaning of the Act. . . ." (A9-10)

Having thus reduced the scope of the Board's hearing to the single issue of whether Obermeier could be regarded as a supervisor within the meaning of the Act, the Trial Examiner heard the evidence on the issue and concluded that Obermeier could not be regarded as a supervisor (A14) and that therefore both the Company and the Union must be considered to have violated the Act as charged in the Board's complaint (A14-15, A16-17). The Trial Examiner recommended, *inter alia*, that the Company be ordered to reinstate Obermeier (A15, (A17) and that the Company and the Union be jointly and severally assessed to reimburse Obermeier for his loss of back pay (A15-16, A19).

In written exceptions filed with the Board after the hearing the Company excepted to:

". . . the Trial Examiner's ruling . . . that the 'sole issue' to be resolved is whether Obermeier

is a supervisor within the meaning of the Act. The grounds for this exception are: The complaint alleged that the discharge and *failure to reinstate* [emphasis by Company] Obermeier were caused by the Union's demand by letter . . . [The Company's] Answer admitted that the discharge was so motivated but by an appropriate denial and in its second affirmative defense, [The Company] clearly contended that the failure to reinstate Obermeier stemmed from the fact that [the Company] learned shortly after Obermeier's discharge of the unfounded defamatory charges to which reference is made in that defense, and of the concession by Obermeier in a hearing before the Union's Trial Board that he had no evidence whatever to support such charges. At the hearing before the Board's Trial Examiner it was developed . . . that [the Company's] counsel offered to reinstate Obermeier if he would disavow the unfounded charges. This offer was made through the representative of the [Board's] General Counsel, and was repeated at the hearing. . . . [The Company's] counsel, in making this offer, asked the representative of the [Board's] General Counsel whether [the Company] should offer Obermeier unconditional reinstatement with the understanding that [the Company] would then demand a retraction as a condition of his continued employment, but [the Board's] General Counsel's representative assured [the Company's] counsel that no such technical posturing would be insisted upon by the Board. . . . Thus, an important issue is presented under the pleadings and record which is not discussed by the Examiner: namely, whether Obermeier's reinstatement (as distinct from his dismissal) was motivated by the Union's letter demand or by [the Company's] re-

sentment of the unfounded criminal charge against it and by Obermeier's refusals to disavow that accusation." (A24-25)

On review of the Trial Examiner's report, the Board stated, in its Decision and Order (A29-33) that:

"The Board has reviewed the rulings of the Trial Examiner made at the hearing and, for the reasons set forth below, finds, that no prejudicial error was committed. The rulings, except as herein modified, are hereby affirmed. The Board has considered the Trial Examiner's Decision, the Respondent's exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions and recommendations of the Trial Examiner, with the following comments and modifications.

"In its answer to the complaint, the Respondent Employer pleaded as a second affirmative defense that employee Obermeier was unsuitable for reemployment because he had made an allegedly false accusation that the Respondent Employer had been allowed to eliminate certain jobs through a corrupt agreement between the Respondent Employer and the President of the Respondent Union. At the hearing, the [Board's] General Counsel moved that this affirmative defense be stricken on the ground of irrelevancy. After extensive argument by all parties, the Trial Examiner struck the defense and prohibited the introduction of any evidence with respect to this defense. Thereupon, the Respondent Employer made an offer of proof and offered into evidence a document consisting of the transcript of a hearing by a Committee of the Respondent Union upon which the Respondent Em-

ployer relies to support its second affirmative defense. The Trial Examiner rejected the offer of proof and refused to admit the proffered exhibit into evidence. The Trial Examiner also denied a similar offer of proof made by the Respondent Union.

"The Respondent Employer excepts to these rulings by the Trial Examiner and contends that:

"'By striking the second affirmative defense, and by excluding evidence and cross-examination pertinent to that defense, the Examiner had to decide the issue on the basis of the truth of the facts pleaded in that defense, namely (1) that the libel against Tracy is false; (2) that the libel was uttered by Obermeier either with actual knowledge of its falsity for ulterior reasons; or (3) in view of his admission under oath that he had no evidence to support the charge, that it was published recklessly.'

"A perusal of the Employer's second affirmative defense does not bear out the Employer's contention as listed in (2) and (3) above. The 'facts pleaded' in the second affirmative defense are that Obermeier's utterances were false, constituted defamatory charges of criminal conduct, and, as Obermeier refuses to disavow the charges, the Employer is unwilling to reinstate him.

"It is well established that suitability for rehire is a proper subject of inquiry in a case where a violation of Section 8(a)(3) is found, because it is material to the question of the apropriateness of the usual remedy of reinstatement with backpay. We find, accordingly, that it was error for the Trial Examiner to strike the Respondent Employ-

> er's second affirmative defense alleging that Obermeier was unsuitable for reemployment. We shall, therefore, accept Respondent Employer's proffered evidence as part of the record in this proceeding and assume its correctness and validity for the purposes of this decision. Since we are at this stage considering the Respondent's defense and the evidence Respondent proffered to support it, we find that the Trial Examiner's error in striking this defense was not prejudicial. Further, we conclude on the basis of all the evidence, including the evidence contained in Respondent's offer of proof, that Obermeier is entitled to reinstatement with backpay." (A29-31)

The Board thus decided that its Trial Examiner had committed an error in striking the Company's second affirmative defense which pleaded Obermeier's unsuitability for reemployment as the sole cause of the Company's refusal to reinstate him. The Board reasoned that since "suitability for rehire is material to the question of the appropriateness of the usual remedy of reinstatement with backpay", the Company should have been permitted to attempt to prove that Obermeier was in fact unsuitable for reemployment. Accordingly the Board stated that "for the purposes of this decision" the Board would assume the "correctness and validity" of the facts alleged in the Company's second affirmative defense and of the proof offered by the Company to sustain that defense at the hearing.

The facts which the Board thus assumed as the basis of its decision included the allegations in the Company's second affirmative defense that the Company had been "unwilling to reinstate Obermeier solely" because of "the making of such defamatory charges by Obermeier and his refusal to disavow such charges" (A241). The proof

offered by the Company to sustain its second affirmative defense at the hearing included the statement by counsel for the Company that its position in refusing to reinstate Obermeier was that "we didn't have to go back through the motions of putting him back to work and refiring him again when he refused to recant" (A48).

But the Board concluded that even assuming the "correctness and validity" of all the facts alleged in the Company's second affirmative defense and of all the proof offered to sustain that defense at the hearing, the Company's refusal to reinstate Obermeier must still be held to have been an unfair labor practice. Noting that the Company had neither alleged nor proved that Obermeier's accusation had been made with ulterior motives or actual malice, the Board ruled that the Trial Examiner's error in striking the Company's second affirmative defense could not be considered prejudicial to the Company. The Board did not advert to the question of whether its Trial Examiner's error could be considered prejudicial to the Union. The Board ordered the Company to reinstate Obermeier and ordered the Company and the Union jointly and severally to compensate Obermeier for his loss of earnings resulting from his discharge and from the Company's refusal to reinstate him.

The Company complied with the Board's order. The Union requested the Court of Appeals to "either modify the Board's Order so as to eliminate the Union's responsibility for back pay or remand the case to the Board with instructions to find the date on which the Union's responsibility for back pay terminated and adjust the assessment accordingly."* The Court of Appeals denied the Union's request and granted the Board's petition for enforcement of its order without modification.

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* Union's brief in the Court of Appeals, page 13.

Reasons for Granting the Writ

The Supreme Court should not allow the Second Circuit to construe the National Labor Relations Act as empowering the Board to issue a back pay order incompatible with the Board's own findings of fact and for purposes of deterrence rather than for remedial compensation.

The Board explicitly based its back pay order on the "correctness and validity" of the Company's averment that it was "solely" responsible for its own refusal to reinstate Obermeier. Since the Board found that the Company was solely responsible, how in the name of elementary logic could the Board proceed to hold the Union also responsible? Yet the Board ordered the Union, jointly and severally with the Company, to compensate Obermeier for all the back pay lost after the Company's unilateral refusal to reinstate him.

Logic may not be the life of the law but disregard for logic could conceivably be the death of the law. In this case, the Court of Appeals condoned the Board's disregard for logic by invoking "the policies of the Act"—particularly a novel "policy" of punitive deterrence recently introduced by the Second Circuit contrary to the holdings of other circuits and of the Supreme Court.

In reference to "the policies of the Act," the Court of Appeals at 417 F. 2d 468:

> "In applying this remedy, the Board is directed to act in such a manner 'as will effectuate the policies' of the Act 28 U.S.C. §160(c) (1964). We believe that assessing the back pay remedy against the Union in this case is consistent with this directive."

In other words, if the Court believes that a back pay order is consistent with "the policies of the Act," the

Court will overlook any inconsistency between the order and the facts on which it was based.

Of course the Court of Appeals was correct in pointing out that the Act broadly directs the Board "to take such affirmative action, including reinstatement of employees with back pay, as will effectuate the policies of this subchapter." But this extremely broad directive is limited by the succeeding clause: "*Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer *or* [emphasis added] labor organization, as the case may be, *responsible* [emphasis added] for the discrimination suffered by him."

The phrase: "employer *or* [emphasis added] labor organization, as the case may be, "reads as if Congress intended to direct the Board to determine responsibility exclusively in the alternative against either the employer or the labor organization — not against both of them. Nevertheless, for nearly twenty years, since *Union Starch & Refining Co.* v. *N.L.R.B.*, 186 F. 2d 1008 (7th Cir. 1951), *cert. den.* 342 U.S. 815 (1951) and *N.L.R.B.* v. *Newspaper Mail & Del. Union,* 192 F. 2d 654 (2d Cir. 1951), Federal Courts of Appeals have sanctioned the Board's assessment of back pay jointly and severally against employers and labor organizations without any contrary reaction by Congress or the Supreme Court. The present case, however, is the first in which a court has sanctioned the assessment of back pay against both an employer and a labor union where one of them was solely—and the other not at all—responsible for the refusal to reinstate the employee.

The next step would be to sanction the assessment of back pay against either or both the employer and the labor organization where neither of them was found responsible—or, indeed, where there was no loss of back pay at all. Such a step would advance the policy of

punitive deterrence introduced by the Second Circuit in *NLRB* v. *Mastro Plastics Corp.*, 354 F. 2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). In the present case, the Court said at 417 F. 2d 868:

> "The Board's broad remedial power to order compensation for lost pay is intended to be exercised not only to remedy the consequences of an unfair labor practice, but also in aid of the Board's authority to deter unfair labor practices. See *Consolidated Edison* v. *NLRB*, 305 U.S. 197, 236 (1938); *NLRB* v. *Mastro Plastics Corp.*, 354 F. 2d 170, 175 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966).

It is difficult to see how a "remedial" power—no matter how broad—could be a power "to deter". It is even more difficult to see how the Court of Appeals could cite the *Consolidated Edison* case as supporting a policy of punitive deterrence. In that case, the Supreme Court said at 305 U.S. 235-236:

> "That section [§10(c) of the Act] authorizes the Board, when it has found the employer guilty of unfair labor practices, to require him to desist from such practices 'and to take such affirmative action, including reinstatement of employees with or without pack pay, as will effectuate the policies of this Act.' We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict on the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board may be of the opinion that the policies of the Act might be effectuated by such an order.

"The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing the consequences of violation where those consequences are of a kind to thwart the purposes of the Act."

The holding in the *Consolidated Edison* case, though cited by the Court of Appeals in the present case, is directly contrary to the position taken herein and in the *Mastro* case by this Court of Appeals. And the *Consolidated Edison* case has been repeatedly cited, quoted and followed by the Supreme Court (see, *e.g., Republic Steel Corp.* v. *NLRB,* 311 U.S. 7, 11-12 (1940); *Carpenters Local* v. *NLRB,* 365 U.S. 651, 655 (1961)), as well as by Courts of Appeals other than the Second Circuit (see, *e.g., NLRB* v. *Brown Lumber Co.,* 336 F. 2d 641, 644 (6th Cir. 1964)). The essence of the accepted interpretation of the Act as stated in these cases is that the Board's authority to assess back pay can be exercised only against a party found to have been causally responsible for the loss of the back pay assessed. On the other hand, the essence of the Second Circuit's policy of punitive deterrence, as stated by the Court of Appeals in *Mastro* and in the present case at 417 F. 2d 868, is that the Board may order and the Court enforce an assessment of back pay "not only to remedy the consequences" of a violation, but to impose a penalty "in aid of the Board's authority to deter unfair labor practices" in the future or in general.

As if appalled by its departure from the accepted interpreation of the Act, the Court of Appeals hastens to add: "This is not to suggest that the back pay order may be used in a purely punitive manner." But if the assessment in the present case was something less than purely punitive, the difference between such an assess-

ment and a purely punitive assessment will remain forever inexplicable to a petitioner who is being penalized for a violation which the Board found was committed solely by another party. In the context of the present case, the Court's further statement that: "The policy [of deterrence] does, however, authorize the Board to go beyond a consideration of which party is primarily responsible" would have been more to the point if the Court had omitted the word "primarily". The idea of primary and secondary liability—nowhere mentioned in the Act—is obviously irrelevant where the Board has itself found one of the parties solely responsible.

To the same effect, in stating that: "The Board may allocate causal responsibility on this issue and assess the back pay accordingly," the Court of Appeals evidently assumed that its policy of punitive deterrence empowers the Board to "allocate" causal responsibility as a sort of legal fiction to support a back pay penalty against a party which did not actually cause the loss. But the statute speaks to the contrary. The indispensibility of proof of causal responsibility is emphasized in the wording Section 8(b)(2), 28 U.S.C. 158(b), 661 Stat. 141: "It shall be an unfair labor practice for a labor organization or its agents * * * to cause or attempt to cause an employer . . ."

The concluding statement of the Court of Appeals:

> "The Union's burden of limiting its liability for Obermeier's continuing economic loss was not onerous. At any time, the Union could have informed the Company that it had no objection to his reinstatement. This would have been effective to stop the running of the back wage claim against the Union even if the Company chose not to reinstate Obermeier. Citations. However, the Union never so informed the Company. Rather, it consistently ad-

> hered to the position that he should be reinstated only if he recanted his remarks. Having prompted Obermerier's discharge because of his criticism of the Union president and having persisted in its insistence that he must withdraw his comments as a condition of renewed membership and employment, the Union cannot shift to the Company the entire responsibility for Obermeir's loss of earnings."

begs the question and misstates the issue.

The Court's statement begs the question by assuming that the Union "persisted in its insistence" that Obermeier withdrew his "comments as a condition of renewed . . . employment [*sic*] and that this insistence was causally connected with the Company's refusal to reinstate Obermeier. But since the Board found that the Company was solely responsible for its refusal to reinstate Obermeier, it follows that the Union breached no duty, did no wrong, and caused no loss of pay to Obermeier by not informing the Company that the Union had no objection to Obermeier's reinstatement. In all the cases cited by the Court on this point, the Board found that both the Union and the Company were causally responsible for the Company's failure or refusal to reinstate the employee. In none of those cases did the Board find, as in the present case, that the Company was solely responsible.

The Court's statement misstates the issue by accusing the Union of attempting to "shift to the Company the entire responsibility for Obermeier's loss of earnings." The truth is that the Union requested the Court of Appeals to "either modify the Board's order so as to eliminate the Union's responsibility for back pay or remand the case to the Board with instructions to find the date on which the Union's responsibility for back pay terminated and adjust the assessment accordingly." * The issue is not whether

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* Union's brief in the Court of Appeals, page 13.

the Union can shift responsibility to the Company. The Board's findings of fact have already done so. The issue is whether "the policies of the Act" can support an assessment of back pay incompatible with the Board's findings of fact and for the purposes of deterrence rather than remedial compensation.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Of Counsel:

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February 10, 1970

APPENDIX

Opinion of the Court Below

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 43, 44—September Term, 1969.

(Argued September 19, 1969 Decided October 24, 1969.)

DOCKET Nos. 33220, 33221

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

UNITED MARINE DIVISION, LOCAL 333,
NATIONAL MARITIME UNION, AFL-CIO,

Respondent.

Before:

MOORE, HAYS and ANDERSON,
Chief Judges.

The National Labor Relations Board petitions for enforcement against United Marine Division, Local 333, National Maritime Union, AFL-CIO, of its order issued June 28, 1967, 166 N.L.R.B. No. 9. The Board's order was based on a finding that the Union violated Section 8(b)(1)(A) and (b)(2) of the National Labor Relations Act, 29 U.S.C. §158(b)(1)(A) and (b)(2) (1964).

Order enforced.

MICHAEL F. ROSENBLUM, Attorney, National Labor Relations Board (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, William F. Wachter, Attorney, all of the National Labor Relations Board, of counsel), *for Petitioner.*

RICHARD L. NEWMAN, New York, N. Y. (Steven L. Werner, New York, N. Y., of counsel), *for Respondent.*

HAYS, *Circuit Judge:*

The National Labor Relations Board petitions for enforcement of its order against United Marine Division, Local 333, National Maritime Union, AFL-CIO, 166 NLRB No. 9. The Board's order was based on a finding that Local 333 violated Section 8(b)(1)(A) and Section 8(b)(2) of the National Labor Relations Act, 29 U.S.C. §158(b)(1)(A) and (b)(2) (1964),[1] by causing Tracy Towing, Inc.

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[1] "It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

to discharge its employee John Obermeier.[2] The Union contests that part of the order which requires it, jointly and severally with the Company, to compensate employee Obermeier for any loss of earnings he suffered as a result of his unlawful discharge.

The essential facts are not in dispute. John Obermeier was employed by the Company as a first assistant engineer aboard one of its tugboats. His employment was covered by a collective bargaining agreement between the Union and the Company. The agreement contained a union-security clause, requiring membership in the Union as a condition of continued employment. Obermeier was a member of the Union.

At a regular monthly meeting of the Union, Obermeier who was participating in a discussion of an increase in Union dues, charged that the Union's president "was working for the boat owners." By Obermeier's own later admission to the grievance committee these words were intended to imply that the president was taking graft. Obermeier persisently refused to retract his charge despite the president's warning that he was risking his job.

The Union's president filed charges against Obermeier, and, in accordance with internal Union procedures, the Union grievance committee held a hearing of which a stenographic record was made. During the course of the hearing it was brought out that Obermeier's statements at the Union meeting were predicated upon his long-standing

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[2] The Board also found that the Company violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. §158(a)(1) and (3) (1964), by discharging Obermeier. The petitioner's brief states that the Company has complied with that part of the order which is directed against it.

discontent with the conduct of the president. Specifically, Obermeier criticized the role of the president in the Union's decision several years before to comply with the Company's request to reduce the number of employees on the boats. Simply stated, Obermeier felt that the Union president in that matter had acted in the interest of the Company and contrary to the interest of the employees. In response to a question as to whether he intended to imply that the president "was getting paid by the boat owners for doing something that was detrimental to the membership of the union." Obermeier said: "I do not know, cannot prove, cannot say definitely that he was getting paid, no." Obermeier, however, admitted that he was aware at the time of making his statement that it carried an implication of graft-taking. While adhering to his opinion of the president, Obermeier stated that he regretted his remarks and that "there was no intention or malice behind the thing as far as [the president's] reputation or employment was concerned."[3]

Obermeier was suspended from membership in the Union for a period of six months and deprived of his union privileges for one year. The Union president advised the Company of the Union's action against Obermeier and asked the Company "to relieve him of his duties immediately." Upon reporting to work, Obermeier was told by a Company official that, since he was no longer a member in good standing of the Union, he was discharged from the Company's employ.

Obermeier thereupon filed charges with the Board and a complaint was issued against the Company and the

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[3] Upon an examination of Obermeier's testimony, the Board found nothing to indicate that his remarks at the grievance committee hearing were deliberately or maliciously false.

Union alleging violations of Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (b)(2) of the National Labor Relations Act, 29 U.S.C. §§158(a)(1) and (3), 158(b)(1)(A) and (b)(2). The trial examiner found that the Union and the Company had engaged in and were engaging in the unfair labor practices alleged in the complaint. As of the date of the trial examiner's decision, Obermeier had received no unconditional offer of reinstatement from the Company. Nor had the Union advised the Company that it no longer had any objection to his employment.

The Board affirmed its trial examiner and ordered the Union and the Company jointly and severally to compensate Obermeier for any loss of earnings he suffered as a result of the discrimination practiced against him.

The Union does not contest the Board's conclusion that it violated Section 8 (b)(1)(A) and Section 8(b)(2) of the Act. Nor could it. The Union sought and obtained Obermeier's discharge because of his non-membership. His loss of membership was the result of his suspension which came about because of his remarks attacking the Union president. The Union's action violated the explicit statutory prohibition against causing or attempting to cause an employer to discriminate against an employee "with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. §158(b)(2) (1964). *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 40-42 (1954); *NLRB* v. *Local 50, American Bakery & Confectionery Workers Union*, 339 F. 2d 324, 326-28 (2d Cir. 1964), cert. denied, 382 U.S. 827 (1965).

The Union, however, contests that part of the order which holds it jointly and severally liable with the Com-

pany for Obermeier's back pay. It contends that the Company's failure to reinstate Obermeier resulted solely from the Company's independently formulated conclusion that Obermeier's statements, reflecting discredit on the Company for bribing a union official, rendered him unfit for reemployment. The Union argues that it was actually charged with two violations of the Act: (1) causing or attempting to cause the Company to discharge Obermeier for a statutorily-prohibited reason; and (2) thereafter causing or attempting to cause the Company to refuse to reinstate Obermeier. The Union asserts that there was no proof that it committed the second violation. It relies for exoneration on the Company's offer to prove that its failure to reinstate Obermeier was due "solely" to Obermeier's refusal to "disavow the imputation of wrongdoing on the part of the company."[4] This offer of proof was rejected by the trial examiner but was accepted and assumed as correct by the Board on the issue of Obermeier's suitability for reemployment.[5] The Union asserts that the Board's acceptance of this evidence necessarily leads to the conclusion that the Union did not cause or attempt to cause the Company to fail or refuse to reinstate Ober-

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[4] The Company's second affirmative defense to the Board's complaint included the following statement:

> "By reason of the making of said unfounded defamatory charges of criminal conduct by Obermeier and his refusal to disavow such charges so that publicity of such disavowal could be given to the many people before whom such charges were made, Respondent Tracy is unwilling to reinstate Omermeier solely for that reason, and Respondent Tracy alleges that it would not effectuate the purposes of the Act for the Board to order reinstatement in those circumstances."

[5] The Board found, however, that this evidence did not justify the Company's failure to reinstate Obermeier.

meier and that it was therefore improper to subject the Union to the back pay order. We do not agree.

The back pay order directed against the Union was based upon the Union's action in causing the Company to discharge Obermeier because of his suspension from Union membership. Upon such a finding the Board is authorized by statute to require back pay "of the employer or labor organization, as the case may be, responsible for the discrimination suffered" by the employee. 29 U.S.C. §160(c) (1964). See *Radio Officers' Union* v. *NLRB, supra,* at 54. In applying this remedy, the Board is directed to act in such a manner "as will effectuate the policies" of the Act. 29 U.S.C. §160(c) (1964). We believe that assessing the back pay remedy against the Union in this case is consistent with this directive.

The Board's broad remedial power to order compensation for lost pay is intended to be exercised not only to remedy the consequences of an unfair labor practice, but also in aid of the Board's authority to deter unfair labor practices. See *Consolidated Edison* v. *NLRB,* 305 U.S. 197, 236 (1938); *NLRB* v. *Mastro Plastics Corp.,* 354 F. 2d 170, 175 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966). This is not to suggest that the back pay order may be used in a purely punitive manner. The policy does, however, authorize the Board to go beyond a consideration of which party was primarily responsible for the employee's continuing economic loss to a determination of which party caused the employee to be placed in the position where he would be subject to such loss. The Board may allocate causal responsibility on this issue and assess the back pay accordingly.

The Union's burden of limiting its liability for Obermeier's continuing economic loss was not onerous. At any

time the Union could have informed the Company that it had no objection to his reinstatement. This would have been effective to stop the running of the back wage claim against the Union even if the Company chose not to reinstate Obermeier. See *Pinkerton's National Detective Agency, Inc.*, 90 NLRB 205, 213 (1950), aff'd sub nom., *NLRB* v. *Pinkerton's National Detective Agency, Inc.*, 202 F. 2d 230 (9th Cir. 1953). However, the Union never so informed the Company. Rather, it consistently adhered to the position that he should be reinstated only if he recanted his remarks. Having prompted Obermeier's discharge because of his criticism of the Union president and having persisted in its insistence that he must withdraw his comments as a condition of renewed membership and employment, the Union cannot shift to the Company the entire responsibility for Obermeier's loss of earnings.

Holding the Union jointly and severally liable with the Company for Obermeier's back pay is entirely consistent with the policies of the Act. See *Radio Officers' Union* v. *NLRB*, *supra* at 40-42. To allow the Union to escape liability for Obermeier's back wages would be to provide an unjustifiable exception to a union's liability under Section 8(b)(2) of the Act.

Order enforced.

Order of the Court Below

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 33220-1

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

UNITED MARINE DIVISION, LOCAL 333,
NATIONAL MARITIME UNION, AFL-CIO,

Respondent.

JUDGMENT

Before: MOORE, HAYS and ANDERSON, Circuit Judges

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent United Marine Division, Local, 333, National Maritime Union, AFL-CIO, its officers, agents, and representatives on June 28, 1967. The Court heard argument of respective counsel on September 19, 1969, and has considered the briefs and transcript of record filed in this cause. On October 24, 1969, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Second Circuit that the said order of the National Labor

Relations Board in said proceeding be enforced, and that United Marine Division, Local 333, National Maritime Union, AFL-CIO, its officers, agents, and representatives, abide by and perform the directions of the Board in said Order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Respondent.

ROBERT P. ANDERSON
Judge, United States Court of
Appeals for the Second Circuit

PAUL R. HAYS
Judge, United States Court of
Appeals for the Second Circuit

Filed: November 17, 1969.

Decision and Order of the National Labor Relations Board

On March 3, 1967, Trial Examiner Wellington A. Gillis issued his Decision in the above-entitled proceedings, finding that the Respondents had engaged in and were engaging in the unfair labor practices alleged in the complaint and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondents filed exceptions to the Trial Examiner's Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and, for the reasons set forth below, finds that no prejudicial error was committed. The rulings, except as herein modified, are hereby affirmed. The Board has considered the Trial Examiner's Decision, the Respondent's exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following comments and modifications.

In its answer to the complaint, the Respondent Employer pleaded as a second affirmative defense that employee Obermeier was unsuitable for reemployment because he had made an allegedly false accusation that the Respondent Employer had been allowed to eliminate certain jobs through a corrupt agreement between the Respondent Employer and the President of Respondent Union. At the hearing, the General Counsel moved that this affirmative defense be stricken on the ground of irrelevancy. After extensive argument by all parties, the

Trial Examiner struck the defense and prohibited the introduction of any evidence with respect to this defense. Thereupon, the Respondent Employer made an offer of proof and offered into evidence a document consisting of the transcript of a hearing by a committee of the Respondent Union upon which the Respondent Employer relies to support its second affirmative defense. The Trial Examiner rejected the offer of proof and refused to admit the proffered exhibit into evidence. The Trial Examiner also denied a similar offer of proof made by the Respondent Union.

The Respondent Employer excepts to these rulings by the Trial Examiner and contends that:

> "By striking the second affirmative defense, and by excluding evidence and cross-examination pertinent to that defense, the Examiner had to decide the issue on the basis of the truth of the facts pleaded in that defense, namely, (1) that the libel against Tracy is false; (2) that the libel was uttered by Obermeier either with actual knowledge of its falsity for ulterior reasons; or (3) in view of his admission under oath that he had no evidence to support the charge, that it was published recklessly."

A perusal of the Employer's second affirmative defense does not bear out the Employer's contention as listed in (2) and (3) above. The "facts pleaded" in the second affirmative defense are that Obermeier's utterances were false, constituted defamatory charge of criminal conduct, and, as Obermeier refuses to disavow the charges, the Employer is unwilling to reinstate him.

It is well established that suitability for rehire is a proper subject of inquiry in a case where a violation of Section 8(a)(3) is found, because it is material to the question of the appropriateness of the usual remedy of reinstatement with backpay.[2] We find, accordingly, that it was error for the Trial Examiner to strike the Responent Employer's second affirmative defense alleging that Obermeier was unsuitable for reemployment. We shall, therefore, accept Respondent Employer's proffered evidence as part of the record in this proceeding and assume its correctness and validity for the purposes of this decision.[3] Since we are at this stage considering the Respondent's defense and the evidence Respondent proffered to support it, we find that the Trial Examiner's error in striking this defense was not prejudicial. Further, we conclude on the basis of all the evidence, including the evidence contained in Respondent's offer of proof, that Obermeier is entitled to reinstatement with backpay. Obermeier's statements to which the Respondent Employer takes exception were made in the heat of discussion at an internal Union meeting and in the course of Union affairs. Obermeier's charge, made directly to the Union's president, was that on an earlier occasion the conduct of the Union's president had been such as to indicate that, in Obermeier's words, he "was working for the boat owners". Obermeier did not state, as Respondent Employer contends, that the "boatowners" had bribed or paid off the Union's president. Nor

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[1] See footnote 5 of the Trial Examiner's Decision for a full recital of the Respondent Employer's second affirmative defense.

[2] See *John F. Cunco Company*, 152 NLRB 929.

[3] The Respondent Employer's request for oral argument is denied because in our opinion the record, exceptions, and briefs adequately set forth the issues and positions of the parties.

did he specify or name any officer or other representative of Respondent Employer as having engaged in improper conduct. At the Union committee hearing, Obermeier, in substance, disavowed an intent to imply criminal conduct of the kind imputed to his statements by spokesmen for the committee. And we find nothing in the transcript of the Union committee hearing to indicate that Obermeier's utterances, even though they may have been inaccurate, were deliberately or maliciously false.[4]

Since the statements of Obermeier were made at a Union meeting, were pertinent to a debate involving internal Union affairs, and, as we have found, were not deliberately or maliciously false, it is clear beyond doubt that Obermeier was engaged in concerted, protected activity when he made such statements. If the Employer had discharged Obermeier for making such statements, it would have committed a violation of the Act.[5] Therefore, since such statements would not constitute a valid basis for discharge, *a fortiori*, they do not warrant denial of the usual remedy of reinstatement and backpay granted to an employee who, like Obermeier, has been unlawfully discharged.

Accordingly, in all the circumstances of this case, we find that the policies of the Act will best be effectuated by ordering Obermeier's reinstatement with backpay in accord with the Trial Examiner's recommendation.

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[4] *Walls Manufacturing Company, Inc.*, 137 NLRB 1317; *Marlin Firearms Company*, 116 NLRB 1834; *Vermont American Furniture Corporation*, 82 NLRB 408.

[5] *Walls Manufacturing Company, Inc., supra.*

Decision and Order of the National Labor Relations Board

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Tracy Towing Line, Inc., New York, New York, its officers, agents, successors, and assigns, and Respondent United Marine Division, Local 333, Maritime Union, AFL-CIO, New York, New York, its officers, agents, ? ? ? ? ? ? shall take the action set forth in the Trial Examiner's Recommendations.

Dated, Washington, D. C., June 28, 1967.

[Subscription Omitted in Printing]